INSANITY AND THE LAW OF NEGLIGENCE.

It is a singular fact and one not altogether creditable to our jurisprudence, considered as a science, that in this Twentieth Century, the question of the liability of an insane person for tortious conduct—or rather, for that which would be tortious conduct on the part of a sane person,—should remain to a large extent an open question.

It is true that an abundance of *dicta* are to be found in the books to the effect that an insane person is liable for tort, in like manner as a sane person, and elaborate reasoning is indulged in by text-writers on Torts, to show why this ought to be the rule of law; but when we come to examine the decisions, we find them to fall far short of establishing any such general rule, and even the text-writers who lay down the rule as settled law, give many exceptions, based upon decisions or upon reasoning outside of decisions, which to a large extent nullify the alleged rule.

It may, indeed, be questioned whether there is any sufficient authority in the reported cases for the proposition, notwithstanding its repeated statement in the text-books and the general understanding in the profession that such is the law and that insanity as a general rule is no defense in an action of tort.

The principle is stated broadly by Judge Cooley in his work on Torts:[1]

> "The reasons that have controlled in these cases are not very clearly set forth by the authorities, but the law has always held insane persons and other incompetents responsible for damages resulting from their tortious actions, and it has given all the usual remedies against them, even to the very severe one of the taking of the body in execution while that barbarous mode of compelling redress was allowable in other cases."

That there are authorities apparently supporting this broad proposition is undoubtedly true,—although so recent a writer as Prof. Jaggard of the University of Minnesota, in his work on Torts, says of the English authorities, in a foot-note:[2]

[1] P. *101 (2nd Ed. p. 117.) [2] Vol. I, p. 156.

"While there are many *dicta* to the effect in England (see Bac. Abr. 'Trespass' G; Maxims Reg. 7, note; 2 Rolle's Abr. 547; Weaver *v.* Ward, (1617) Hob. 134; Haycraft *v.* Creasy (1801) 2 East, 92–104), it is said, on good authority, that there is no reported instance of an action for tort ever having been brought in England against a lunatic, Clerk & L. Torts, 33. Query, is not Cross *v.* Andrews (1598) 2 Cro. Eliz. 622, such a case?"

The case of Cross *v.* Andrews,[1] was an action on the case against an inn-keeper and declared upon the common custom of the realm, that an inn-keeper should keep the goods of his guests safely, etc. The defendant pleaded, that when the plaintiff lodged with him, he was sick, and of *non-sane memory*, by occasion of his sickness whereof he then languished. It was thereupon demurred, and adjudged without argument for the plaintiff. "For the defendant, if he will keep an inn, ought at his peril to keep safely his guests' goods; and although he be sick, his servants then ought carefully to look to them. And to say he is of *non-sane memory*, it lieth not in him to disable himself, no more than in debt upon an obligation. Wherefore it was adjudged for the plaintiff."

It will be seen that this case is one of those which lie on the border line between tort and contract, involving the rigid common law liability of a common carrier or an inn-keeper.

Haycraft *v.* Creasy,[2] has absolutely no bearing on this subject. The only question in the case was whether a person who represents to another that he has knowledge of the financial responsibility of a third party, when in fact he has no knowledge on the subject, is liable in damages for such representation. There is a *dictum* of Lord Kenyon (at p. 104) calling attention to Lord Bacon's maxims that there is a distinction "between answering *civiliter et criminaliter* for acts injurious to others; in the latter case the maxim applied, *actus non facit reum nisi mens sit rea*, but it was otherwise in civil actions, where the intent was immaterial, if the act done were injurious to another."

The early *dictum* in Hobart's Reports, in the time of James I, has been cited and followed ever since as an authority. This dictum is found in the case of Weaver *v.* Ward,[3] which reads as follows:

[1] 2 Cr. Eliz. 622. [2] (1801) 2 East 91. [3] Hobart's Reports, 134.

"Weaver brought an action of trespass, of assault and battery, against Ward. The defendant pleaded that he was, amongst others, by the commandment of the Lords of the Council, a trained soldier, in London, of the band of one Andrews, Captain, and so was the plaintiff; and that they were skirmishing with their musquets, charged with powder for their exercise *in re militari*, against another captain and his band; and as they were so skirmishing, the defendant, *casualiter et per unfortunium et contra voluntatem suam*, in discharging of his piece, did hurt and wound the plaintiff, which is the same, etc. *absque hoc*, that he was guilty *aliter sive alio modo* and upon demurrer by the plaintiff, judgment was given for him. For, though it were agreed that if men tilt or turney in the presence of the king, or any two masters of defence, playing their prizes, and kill one another, that this shall be no felony; or if a lunatic kill a man, or the like, because felony must be done *animo felonico:* yet in trespass which tends only to give damages according to hurt or loss, it is not so, and therefore, if a lunatic hurt a man, he shall be answerable in trespass; and, therefore, no man shall be excused of a trespass (for this is the nature of an excuse and not a justification, *prout ei bene licuit*), except it may be judged utterly without his fault.

"As, if a man by force take my hand and strike you, or if, here, the defendant had said that the plaintiff ran across his piece when it was discharged, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt."

It will be seen that this case likens an injury suffered at the hands of a lunatic to an injury resulting from accident and without any intent or even any negligence on the part of the person causing the injury.

The subject of injury resulting from inevitable accident is itself one on which there is great uncertainty in the law. This subject is quite fully discussed by Sir Frederick Pollock, in his work on Torts.[1] He defines the phrase "inevitable accident" as meaning an accident which is "not avoidable by any such precaution as a reasonable man doing such act then and there, could be expected to take." The learned author says:

"It may seem to modern readers that only one solution of the problem thus stated is possible, or rather that there is no problem at all. No reason is apparent for not accepting inevitable accident as an excuse. It is true that we may suppose the point not to have been considered at all in an archaic stage of law, when legal redress was but a mitigation of the first impulse of private revenge. But private revenge has disappeared from our modern law; moreover we do not nowadays expect a reasonable man to be

[1] 6th Ed., p. 132.

angry without inquiry. He will not assume, in a case admitting of doubt, that his neighbor harmed him by design or negligence. And one cannot see why a man is to be made an insurer of his neighbor against harm which (by our hypothesis) is no fault of his own. For the doing of a thing lawful in itself with due care and caution cannot be deemed any fault. If the stick which I hold in my hand and am using in a reasonable manner and with reasonable care, hurts my neighbor by pure accident, it is not apparent why I should be liable more than if the stick had heen in another man's hand. If we go far back enough, indeed, we shall find a time and an order of ideas in which the thing itself that does damage is primarily liable, so to speak, and through the thing its owner is made answerable. That order of ideas was preserved in the noxal actions of Roman law, and in our own criminal law by the forfeiture of the offending object which had moved, as it was said, to a man's death, under the name of deodand. But this is matter of history, not of modern legal policy. So much we may concede, that when a man's act is the apparent cause of mischief, the burden of proof is on him to show that the consequence was not one which by due diligence he could have prevented. But so does (and must) the burden of proving matter of justification or excuse fall in every case on the person taking advantage of it. If he were not, on the first impression of the facts, a wrong-doer, the justification or excuse would not be needed.

"We believe that our modern law supports the view now indicated as the rational one, that inevitable accident is not a ground of liability. But there is a good deal of appearance of authority in the older books for the contrary proposition that a man must answer for all direct consequences of his voluntary acts at any rate, or as Chief Justice O. W. Holmes has put it 'acts at his peril.' Such seems to have been the early Germanic law, and such was the current opinion of English lawyers until about a century ago, if not later. On the other hand, it will be seen on careful examination that no actual decision goes the length of the dicta which embody this opinion. In almost every case the real question turns out to be of the form of action or pleading. Moreover, there is no such doctrine in Roman or modern Continental jurisprudence. And, what is more important for our purpose, the point has been decided in the sense here contended for by the courts of the highest authority in the United States."

The learned author then refers to and comments on: The Nitro-Glycerine Case,[1] Brown *v.* Kendall,[2] and other cases of like effect. He cites the case of Castle *v.* Duryee,[3] as somewhat conflicting but not necessarily so, and then takes up the English decisions, and after examining and distinguishing the earlier cases, he concludes (at p. 145) that there is "good warrant for saying that the principle of the Nitro-Glycerine Case and Brown *v.* Kendall, is now part of the common law in England as well as in America."

[1] (1872) 15 Wall. 524. [2] (1850) 6 Cush. 292. [3] (1865) 2 Keyes 169.

The reasons assigned by the text-writers for the rule that an insane person can be held liable civilly for damages for tort, although not liable criminally for the same act, are based entirely on expediency. The principle is invoked that " where one of two innocent persons must bear a loss, he must bear it whose act caused it;" and also the argument that unless a lunatic is held responsible for acts which would be tortious if committed by a sane person, the lunatic would be given impunity to do wrong, and, consequently, the interests of society require that he should be held liable.

Again, it is urged that the estate of a lunatic should be held liable for his acts, in order that his relatives may be vigilant in having him judicially declared a lunatic, for the protection of his estate, and, incidentally, for the protection of society at large.

Still further, the analogy between an infant and a lunatic is referred to, and, as an infant is held liable for his wrongful acts, notwithstanding he is not liable upon any contract obligation and notwithstanding his immature intelligence, so, it is argued, should a lunatic be held liable.

Still further, the principle is relied upon that recompense is what the law aims at, and as the question of civil responsibility for wrong suffered is one which directs our attention chiefly to the injury done, " the weakness of the party committing it, or the absence of any deliberate purpose to injure, must commonly be of little or no importance."[1]

It is questionable whether any one of these reasons is logically satisfactory. The analogy between an infant and a lunatic is only partially correct. It is quite true that an infant, especially in the earlier stages of childhood, is not fully conscious of the consequences of his acts or of the seriousness of their nature. He may act from mere childish impulse, without stopping to consider, or without fully appreciating the inherent character of his acts and the injury which will result therefrom. Nevertheless, even children are intelligent beings, and unless of such very immature years as to be utterly unconscious of right and wrong, they should be held responsible for the consequences of their vol-

[1] Cooley on Torts, p. 99.

untary acts. At any rate, the rule is so absolutely settled, with regard to infants, that it cannot very well be questioned. When we come, however, to the question of a person *non compos mentis*, we have a situation of absolute mental incapacity, which the criminal law recognizes to its fullest extent. There seems to be no logical reason why a lunatic should be free from criminal responsibility for assault and battery, or even for murder, while he can be held liable in damages for the same offense.

The other reasons assigned for holding a lunatic responsible in tort are also open to serious question. Prof. Jaggard, in his work on Torts[1] has a very interesting discussion on this whole subject, in the course of which he says:

"The view of the law which held that men acted at their peril, and that liability for tortious conduct was absolute, logically recognized that so long as the duty was violated, and harm ensued, it was immaterial whether the damage was due to an accident, or to a person incapable of reason."

And again:

"It is urged with great force, with the result of at least partial acceptance, that this conception is too radical. The early cases on accidental trespass have not been universally followed. It is insisted that they were unsound in reason, and that, so far as their actual enunciation of the law is concerned, they are not authority for the position they are cited to sustain. The public policy of the law justifies inquiry into the degree of mental derangement in crimes and contracts; so that this very argument seems to show that the same practice should apply to the law of torts.

"* * * With respect to liability for personal commission, it is denied that an insane person can be a legal cause, and insisted that injuries attributable to such a person are really due to inevitable accident, or the act of God, for which no action lies."

Without, however, going into a discussion of the general proposition that an action will lie against a lunatic in tort, and assuming that this is the rule of law, whether rightly or wrongly so, it is, nevertheless, subject to certain qualifications. Thus, it is well established that where actual malice is an essential ingredient in the tort, the defendant, if insane, cannot be held liable, and even in cases where he may be held liable without proof of malice, or where the law presumes malice, he cannot be held liable in punitive

[1] Vol. 1, pp. 154 to 158.

damages. So, also, where intent is an inherent ingredient in the offense, and where intent is not, in itself, conclusively presumed from the facts, the defendant will not be liable.

When we come to the subject of negligence, we find the law to be in a most unsettled condition. It seems to have been assumed, in the earlier *dicta* in the books, that a lunatic would be liable for negligence in like manner as a sane person. This assumption was based upon the doctrine already referred to, of liability for inevitable accident. On the other hand, there is strong ground for the contention that as negligence necessarily involves the doing, or failing to do, something that ought to be left undone or ought to be done by a reasonably prudent man, there can be no legal basis for liability where there is a total inability on the part of the defendant to voluntarily do or refrain from doing. Thus, if a man be *non compos mentis*, it would seem that he should be no more liable for negligence than if he were blind or paralyzed and thereby physically incapacitated from doing or refraining from doing what an ordinarily prudent man should do or refrain from doing.

The subject has been before the courts of this State in recent years in a very interesting case, which may be profitably reviewed as showing the condition of the law on this subject.

The case referred to is the case of Williams *v.* Hays.[1] This was an action brought by the plaintiff as assignee of the Phœnix Insurance Company, to recover the amount of insurance paid by the company to the firm of Parsons & Loud under a policy of insurance issued to them as owners of one-sixteenth of the brig Emily T. Sheldon. The brig had been wrecked on Peaked Hill bar off Cape Cod, near Provincetown, Mass. It was alleged by the plaintiff that the loss occurred through the negligence of the defendant, who was the master and part owner of the brig, and who commanded her at the time of the loss,—the plaintiff claiming the right to recover as assignee of the insurance company, which had become subrogated to the rights of the owners, whom it had insured and to whom it had paid the policy.

[1] (1894) 143 N. Y. 442 and (1899) 157 N. Y. 541.

The answer denied the allegations of the complaint, that the loss was caused through the negligence, carelessness, misconduct and improper navigation of the defendant, and alleged that at the time of the wreck, defendant was unconscious of his acts and irresponsible therefor, and was not in a condition to navigate the brig on account of sickness, etc.

It appeared on the trial that the vessel had left Boothbay, Me., on the 18th of March, 1886, with a cargo of ice bound for Annapolis, Md. About sixteen hours after sailing, a storm commenced with high winds, and rain, with a light snow. At the time of the commencement of the storm, the vessel was in George's Channel. Defendant tacked, to work her about, trying to find his way out, until it became practically impossible to tell where he was. He headed her in what was supposed to be the direction of Cape Cod, but not being able to make the Cape, she was hoved to to ride out the gale, about four o'clock in the afternoon of the 20th, and remained hoved to until about that time in the afternoon of the 21st, when the defendant stood her off for what was supposed to be Cape Cod. On Monday morning, the 22nd, between four and five o'clock, Thatcher Island lights were sighted by the defendant. The storm had then abated but there was heavy roll of the sea. The defendant then turned the vessel over to the mate, telling him to keep her by the wind until he made Cape Cod light. He then went below, took fifteen grains of quinine and lay down upon a lounge in his cabin. During the storm he had had but little rest, had not gone to his berth or undressed, had eaten but little, and for forty-eight hours had been constantly upon deck. At about 11 o'clock of that morning, the 22nd, defendant having gone below between four and five o'clock, the second mate, to whom the vessel had been turned over, called the mate, saying that the vessel did not act very well. The mate then went upon deck, and about half-past eleven the steward called the defendant. He was lying, dressed, upon the lounge. He did not get up at the first call and subsequently the steward pulled him off from the lounge, in order to rouse him. He then got up, but within a few minutes was again found lying upon the lounge, and the steward went to him again, and finally succeeded in

getting him up on the deck of the vessel. After he came on deck, the tug "Storm King" came up on their weather quarter and said that the rudder post of the brig was split, and asked the captain if he did not want a tow. He said that he did not, that he guessed "we are all right." The "Storm King" then went away, and about one o'clock another boat came up under the stern of the boat, and offered to tow, but was refused by the captain.

It appeared that an investigation made by the mate showed that the rudder post was split, and the vessel had become unmanageable. The captain refused to accept the statement of the mate, to the effect that the rudder post was split, and refused to take any proper steps to save his vessel, which was consequently driven ashore and wrecked.

The case was first tried before Mr. Justice Barrett and a jury, in June, 1892. Mr. Justice Barrett, in his charge to the jury, says, speaking of the defendant:

"He claims that he had in his system the seeds of malaria, owing to past fevers, and that after two days of severe labor, exposure and loss of sleep he finally succumbed. He tells us that while in this condition, he took a dose of medicine, such as he was in the habit of taking on the approach of certain symptoms of malaria; after that, he declares that he knew nothing. He does not dispute that he might have been up on deck and might have said silly things and given silly orders. But he positively asserts that he knew nothing whatever of what he said or did. He acted, according to the witnesses on the part of the plaintiff like a man who was intoxicated, and he does not dispute that he acted in that way. In effect, he says that though he might have acted like a man who was under the influence of liquor, he was, in fact, not under its influence. * * * I do not mean to express any opinion about the case, or to say any more to you than this: that if you believe that the defendant's conduct was caused by his own voluntary intoxication, of course he must suffer. If he, notwithstanding his fatigue, exhaustion and exposure, sought relief in liquor and became intoxicated, there must be a verdict against him. If, on the other hand, you believe that he did not drink, and that his failure to act or to speak rationally was a result of an affliction which came upon him and of causes over which he had no control; in other words, if he lost his reason by a combination of exhaustion, exposure to bad weather and the effects of a drug taken while so exhausted, then I leave it to you to say whether, under those circumstances, he should be charged herewith negligence, carelessness, misconduct and improper navigation. * * * If, however, he was not guilty of negligence, in that he was not in his right mind, his condition being caused by no voluntary intoxication, but being the result of circumstances which were providential, and over which he had no control, and if

his apparent condition was such that the mate was not guilty of negligence in refraining from depriving him of command and taking charge of the vessel, then the verdict should be for the defendant."

Plaintiff's counsel excepted to this charge, and asked the Court to charge: "As matter of law, that the sickness or insanity of the defendant is no excuse and does not free him from liability," which request the Judge declined. The following colloquy then took place between counsel and the Court:

"PLAINTIFF'S COUNSEL: I ask Your Honor to charge that the circumstances proved here, under which the vessel went ashore, constituted negligence.

"THE COURT: I have charged already that it constituted bad seamanship and improper navigation, and if done by a sane man would have been negligence.

"PLAINTIFF'S COUNSEL: Then Your Honor does charge as I request, as I understand you.

"THE COURT: I do not charge that because if I charge that you must necessarily have a verdict.

"PLAINTIFF'S COUNSEL: In other words, Your Honor thinks or says there might be an excuse for such negligence.

"THE COURT: I do not say anything about an excuse. I think that the condition of the man's mind, caused by the act of God, and not by any voluntary act of his own, might be such that he could not be guilty of negligence, because he had not the capacity to act.

"PLAINTIFF'S COUNSEL: I ask Your Honor to draw the distinction between civil liability and criminal liability, and to charge the jury that although no criminal liability attaches for negligence, the defendant is civilly liable for any loss or injury caused to property under his charge, even if he was insane.

"Declined. Plaintiff excepts."

The jury found for the defendant and judgment was entered upon the verdict, which was affirmed by the General Term, with a brief opinion to the effect that the questions involved in the case had been passed upon by the Court of Appeals in the case of Hays *v.* The Phœnix Fire Insurance Co.[1]

It would seem that the General Term was in error in its view that the decision against the Insurance Company was conclusive of the questions in this case, since the Insurance Company's liability had been upon an entirely different principle of law from that upon which the master of the

[1] (1891) 127 N. Y. 656.

vessel was sought to be held liable. However, the General Term, taking this view of the effect of the prior action of Hays against the Insurance Company, enters into no discusion of the questions involved.

The charge of Mr. Justice Barrett to the jury would seem to be logical and just. It did not, however, commend itself to the Court of Appeals, which, when the case came before that court, reversed the judgment and ordered a new trial, three judges dissenting, namely, Judges Peckham, Gray and O'Brien. The opinion of the Court of Appeals in this case[1] was written by the late Judge Earl, and in some respects it falls short of the vigor and lucidity of reasoning which usually characterized that learned and careful judge. There is an apparent inconsistency between the different portions of the opinion, and it is somewhat difficult to understand precisely what the theory of the learned judge was as to the test to be applied to the liability of the defendant and as to the rationale of such a test. The result of the obscurity found in the opinion of Judge Earl was that the courts promptly proceeded to make a mess of the matter, in endeavoring to follow the enigmetical decision of the Court of Appeals.

On the second trial, the plaintiff had a verdict in accordance with what was supposed to be the ruling of the Court of Appeals. This was unanimously affirmed by the Appellate Division, but was reversed by the Court of Appeals when the case again came before that court in the 157th New York, Judge Bartlett, however, dissenting, on the ground that the facts were substantially the same as upon the former appeal, and that the opinion delivered on the former appeal was controlling, and that the verdict for the plaintiff, below, was in accordance with that opinion.

Judge Earl, in the opinion in 143 N. Y., at page 446, says:

"The important question for us to determine then is whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except perhaps those in which malice and, therefore, intention, actual or imputed, is a necessary ingredient, like libel, slander and malicious prose-

[1] (1894) 143 N. Y. 442.

cution. In all other torts intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinions of judges, has been placed upon several grounds. The rule has been invoked that where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability that the relatives of a lunatic may be under inducement to restrain him, and that tort feasors may not simulate or pretend insanity to defend their wrongful acts causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others."

The learned judge thereupon proceeded to cite authorities, and continues, at page 451:

"There can be no distinction as to the liability of infants and lunatics, between torts of non-feasance and of misfeasance,—between acts of pure negligence and acts of trespass. The ground of the liability is the damage caused by the tort. That is just as great whether caused by negligence or trespass; the injured party is just as much entitled to compensation in the one case as in the other, and the incompetent person must, upon principles of right and justice and of public policy, be just as much bound to make good the loss in the one case as the other; and I have found no case which makes the distinction. That infants and lunatics are liable for damage to property caused by their negligent acts, was asserted in several of the authorities above cited; and it has never been doubted that at common law an action of trover would lie against one intrusted with the personal property of another who destroys it, whether the destruction be by a negligent act or a willful tort.

"I sum up the result of my examination of the authorities as follows: This vessel was intrusted to the defendant—not as agent—but as to the other owners as charterer, lessee or bailee, and if he caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible. The misfortune must fall upon him and not upon the other owners of the vessel."

If the learned judge had stopped here, there would have been no room for doubt left in the case, whether or not the rule of law thus laid down be regarded as sound and wise or as unsound and illogical. The learned judge, however, proceeded:

"If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and while it was raging his efforts to save the vessel were tireless and unceasing, and if he

thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion. * * * If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness."

The learned judge then proceeds to point out that the previous case of Hays *v.* Phœnix Insurance Co. (1891) 127 N. Y. 656, was not an authority for the defendant, that being an action against the Insurance Company, and it being held that his mere carelessness, whether sane or insane, was no defense to such an action, it being an unquestioned rule of law that an insurance company cannot successfully defend an action upon its policy, to recover for a loss, by showing that the insured destroyed the property while insane, or that its destruction was caused by the carelessness of his agents and servants.

On the new trial which followed the reversal by the Court of Appeals, the case came on to be tried before Mr. Justice Beekman and a jury. The testimony was substantially the same as on the former trial, and the learned justice held that under the rule laid down by the Court of Appeals, he was bound to direct a verdict for the plaintiff. Counsel for the defendant expressly asked the court to submit to the jury the following questions:

"First, whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm. Second, whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm and the quinine which was taken therefor. * * * Fifth, whether the defendant, in consequence of his efforts to save the vessel during the storm became mentally and physically incompetent to give the vessel any further care than he did."

Mr. Justice Beekman delivered the following oral opinion:

"I have examined the opinion of the Court of Appeals in this case and am unable to see that I can do otherwise than to direct a verdict for

the plaintiff. Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the principle laid down by the Court of Appeals that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words, the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine, but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it rather than upon the other, the best that can be said about it is that it is a rule which serves the convenience of the public to which individual rights must give way.

"But the Court seems to have suggested that a possible exception to the rule may be found in the present case if it should appear that the condition of the defendant was due to his efforts to save the vessel during the storm. In such a case, the Court says, it might be claimed that his want of care ought not to be attributed to him as a fault. But while propounding the question it expressly declines to express an opinion upon it, thus remitting it to the trial Judge as an original question to be determined by him in the first instance.

"I am unable, however, to perceive the principle which would justify such an exception. Given a full legal responsibility on the part of a lunatic for his acts, how is it material what caused his condition? Of course if his co-owners had committed some wrong against him which caused or contributed to his mental unsoundness, they would not be allowed to take advantage of their own wrong. But there is nothing of this kind in the case. The defendant in doing what he did to protect the ship during the storm, was performing no more than his duty and was incurring demands upon his physical endurance to which mariners are at times exposed in plying their vocation. Further, the negligence alleged did not occur until after the storm was over. How, then, can the fact that the defendant became insane by reason of the stress of these duties make him an exception to a rule which declares mental unsoundness to be no excuse for negligence, although it may have come through no personal fault of the individual so afflicted? If the cause of the insanity is to be an element in determining the question of responsibility, then the fact of negligence depends not only upon the act but also upon the cause of and the responsibility of the lunatic for his mental condition. But this, I believe, will hardly be asserted. The distinction suggested, it seems to me, is, therefore, merely fanciful, not real. It will not stand the test of reason. The suggestion was doubtless the outcome of a feeling of repugnance to a principle of law still felt to be against natural justice. But if the law is to stand as it has been declared, it must be accepted with all its logical consequences. This being the view which I take of the law of the case, I feel constrained to grant the motion and to direct a verdict for the plaintiff."

The case coming up on appeal to the Appellate Division,[1] the Court took the same view as the trial judge, and held that the trial judge correctly applied the judgment of the Court of Appeals, and unanimously affirmed the judgment.

The case coming up again to the Court of Appeals, however,[2] that Court reversed the judgment. Referring to the opinion in the 143 N. Y., the Court say (per Haight, Judge), at page 546:

"The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and non-feasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant 'caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible.' The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held reponsible in all instances for his non-feasance or failure to act we will not now stop to consider."

The Court seems to draw a distinction between negligent mal feasance and negligent non-feasance, though it is not altogether clear just what this distinction would be in its practical application.

The Court then calls attention to the further remarks of Judge Earl, as to the question whether defendant became mentally and physically incompetent solely in consequence of his efforts to save the vessel during the storm, and Judge Haight calls attention to the ruling of the trial justice, and then proceeds:

"It will thus be observed that the case was disposed of below upon the ground that the defendant was liable even though assuming that his condition was the result of exhaustion caused by his efforts to save the ship from the perils of the storm, and the question as to whether the mate was guilty of negligence was not considered. The Appellate Division has affirmed, following in its opinion, the reasoning of the trial judge.

"We cannot give our assent to such a view of the law. To our minds, it is carrying the law of negligence to a point which is unreasonable, and, prior to this case, unheard of, and is establishing a doctrine abhorrent to all principles of equity and justice. In this case, as we have

[1] Williams *v.* Hays (1896) 2 App. Div. 183. [2] (1899) 157 N. Y. 541.

seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5 o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, and for the last forty-eight hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things. (Coke Litt. 78; 9 Coke, 22; Coke Litt. 29; 1 Pothier Obl. pt. 1, c. 1, s. 4, sec. 3.) Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained."

The Court accordingly reversed the judgment and ordered a new trial, Judge Bartlett dissenting, holding that with the same record before the court as on the former appeal, he was unable to understand why the former judgment of the court should not be followed.

The writer is informed by ex-Judge William W. Goodrich, who was counsel for the defendant in the case, that the suit was thereupon discontinued—a practical victory for the defendant. The varying fortunes of this prolonged litigation indicate a struggle in the minds of the various judges considering it, between what was understood to be a rigid rule of law and what was a manifest hardship in the particular case. That a man should be responsible in damages for failing to do what he was physically or mentally unable to do, is certainly shocking to the common-sense of the average individual. Suppose a motorman on a trolley car to be suddenly stricken with paralysis, so as to be unable to apply the brake and bring his car to a standstill, in consequence of which a serious collision occurs; suppose a motorman is suddenly stricken with blindness, so that he is unable to see the track ahead of him, and before he can realize his condition, his car collides with an obstruction; can he be said to be guilty of negligence? What difference is there between the case of physical ob-

scuration of the senses and the total obscuration of the mental faculties?

The question recurs, however, whether there is any such rigid rule of law as Judge Earl, in his opinion seems to imply. It is quite true that the authorities cited by him appear to lay down such a rule. A careful examination of the cases, however, fails to show any instance where the courts have actually applied so severe a rule to a case of negligence. The actual cases which have come before the courts for decision have been almost entirely cases of overt and affirmative acts involving torts upon the person or property of the plaintiff. In such cases, the trespass being established, it is held to be no defence that the party committing the trespass was not conscious of the act; although, even here, it, might be plausibly argued that if the mind did not go with the act, there was no legal wrong done.

A person can be charged with negligence for failing to put out a fire, but surely, if it were shown that a person were confined to his bed, so as to be utterly unable to move, it can hardly be claimed with any show of reason that he was negligent in failing to do what it was physically impossible for him to do.

Shearman & Redfield on Negligence is cited by Judge Earl, in the case of Williams *v.* Hays, as authority for the proposition that lunatics are liable for tortious negligence in like manner as sane persons. It is true that Shearman & Redfield do assert this proposition most unequivocally, saying:[1]

> "Infants and lunatics, without regard to their degree of incapacity, are liable in a civil action for the damage caused by such acts of theirs as would, in sane adults, amount to a tort either willful wrong or culpable negligence. This liability rests not upon the usual principle of personal fault (for there may be none), but upon the broad ground that where one of two innocent persons must bear a loss, he must bear it whose act caused it."

The authorities, however, cited by Shearman & Redfield for this proposition, so far as lunatics are concerned, do not seem to bear out the proposition. The only case directly in point, among those cited in support of the proposition,

[1] 5th Ed., §121.

in the 5th Edition, is this very case of Williams *v.* Hays[1] which itself cited the *dictum* from the former edition of Shearman & Redfield. The other cases cited are:

Morse *v.* Crawford,[2] which was a case of killing an ox; Morain *v.* Devlin,[3] case of nuisance; Cross *v.* Kent[4] burning a barn; Brown *v.* Howe,[5] burning a house; Beals *v.* See,[6] which was an action on contract, having absolutely nothing to do with tortious conduct; Krom *v.* Schoonmaker,[7] false imprisonment.

In a foot note referring to the words "willful wrong," the learned authors say: "Most of the cases cited belong to this category."

In a foot-note to the words "culpable negligence," the only case cited is Williams *v.* Hays,[8] as to which the learned authors say:

"quoting with approval our old Section 57, in which we argued this point. The law is otherwise held in New Hampshire. Stack *v.* Cavanaugh (N. H. 1892), 30 Atl. 350."

On the other hand, Wharton, in his work on Negligence,[9] states the rule with equal positiveness to the contrary effect from the statement of Shearman & Redfield, and says:

"But a man, to be a juridical cause, either through his acts or omissions, must be responsible. If he is irresponsible, he is no longer a cause, but he becomes a condition—i. e., he is ranked among those necessitated forces, which, like weapons of wood or stone, are incapable of moral choice, but act only as they are employed or impelled. The cause of the event to which any of these classes of forces is related as a condition must in every case be a responsible originator. The question, therefore, to be here practically considered is, who are irresponsible? And among such persons we may mention: 1. As to persons incapable of reason there can be no question. Neither an idiot nor a maniac can be a juridical cause. And the same reasoning applies to persons so young and inexperienced as to be unable to exercise intelligent choice as to the subject matter. * * * No suit can be sustained for negligence, of which it is one of the postulates that a person destitute of reason, whether from infancy or insanity, is not guilty of neglecting that which he has no mental capacity to perceive or do."

---

[1] (1894) 143 N. Y. 443. [2] (1845) 17 Vt. 499. [3] (1882) 132 Mass. 87.
[4] (1870) 32 Md. 581. [5] (1857) 9 Gray 84. [6] (1848) 10 Pa. St. 56.
[7] (1848) 3 Barb. 647. [8] (1894) 143 N. Y. 442.
[9] 2nd Ed., Sections 87, 88.

The truth is that there seems to be absolutely no case where the liability of a lunatic for culpable negligence has been passed on judicially; at least, none has come to the notice of the writer, except this case of Williams *v.* Hays, with which the courts, as we have seen, played battledore and shuttlecock, and which finally resulted in favor of the defendant.

Prof. Jaggard, in his second volume,[1] goes so far as to lay down a rule opposite to that of Shearman & Redfield, saying:

"The courts, irrespective of theories, have clearly recognized the doctrine that responsibility is graduated according to capacity and determined by recognized classes. * * * So, unconscious agents and lunatics, persons entirely bereft of reason, cannot be held responsible for personal negligence or have contributory negligence imputed to them"—citing

16 Am. & Eng. Ency. of Law, 406, subdivision 6;
Wharton on Negligence, § 88;
Washington *v.* Baltimore & Ohio R. R. Co. (1880) 17 W. Va., 190.

It must be admitted, however, that none of the authorities cited by either Wharton or Jaggard seem to support the proposition stated by them otherwise than by way of *dictum*. The only case cited by Prof. Jaggard is that of Washington *v.* B. & O. R. R. Co.[2] That case contains a *dictum*, reading:

"Of course, negligence cannot be attributed to an irresponsible person, as an idiot or small child."

The case itself, however, did not have anything to do with idiots or small children, and the remark of the court seems to have been purely obiter.

A very interesting and instructive discussion on this subject appears in the first edition of the American and English Encyclopædia of Law.[3] The text sums up the law as follows:

"It has been said that infants and lunatics are liable for negligence; but this statement is much broader than the true doctrine and is unsupported either by reason or authority. The true rule is that an infant of such tender years as to be incapable of exercising any degree of care or forethought for his own safety or that of others, cannot be guilty of negli-

[1] § 253. [2] (1880) 17 W. Va. 190.
[3] Vol. 16, pp. 406 to 411 and the foot-notes thereto.

gence * * *. But the moment an infant becomes capable of any degree of care, however slight, he is required to use that care of which his age and capacity make him capable, and unless he does exercise care proportioned to his age and capacity he will be chargeable with negligence and become responsible for injuries resulting from a failure on his part to exercise such care as he is capable of. In the case of absolute idiots, and lunatics entirely devoid of reason, the same rules apply as in the case of infants so young as to be incapable of any care, but a person only partially idiotic or insane and capable of some degree of rational care and forethought may be held guilty of negligence for inflicting an injury by a failure to exercise the degree of care and forethought of which he is capable. Thus the mental status and capacity must be constantly considered in the case of infants, idiots and lunatics when charged with negligence, and they should be held responsible or wholly freed from responsibility according to their capacity for exercising some care or their total want of such capacity."

The authorities are collated in the foot-notes. For some reason, this discussion seems to have been omitted from the Second Edition of the American and English Encyclopædia of Law.

The subject is also discussed in Bishop on Non-Contract Law, Sections 505 to 510 and Section 516, and in Sedgwick on Damages, 7th Ed. Vol. 2, p. 323.

It seems, indeed, most extraordinary that the question of the liability of a lunatic for negligence should be, at this late date, still an open question in this State. One would suppose that the question would have arisen frequently and would have been frequently the subject of adjudication. Similar instances, however, are constantly recurring, in the experience of every practitioner, where questions which lie at the very threshold of our jurisprudence seem never to have come before the courts for consideration, or, at any rate, have never received adjudication by the courts of last resort.

The true rule and the only rule consistent with justice and reason, and the rule towards which the authorities are evidently tending, is that a person who is *non compos mentis* cannot be held liable for negligence.[1]

WM. B. HORNBLOWER.

[1] The foregoing article is enlarged and revised from an address delivered before the Society of Medical Jurisprudence in December, 1904.